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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY, APPELLANTS

v.

THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

KATHRYN A. OBERLY
SUSAN W. COOK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

JEROME NELSON
Acting General Counsel

JEROME M. FEIT
Deputy Solicitor

JOANNE LEVEQUE
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Titles I and III of the Public Utility Regulatory Policies Act of 1978 require state regulatory authorities to consider adoption of certain rate design and regulatory standards for electric and natural gas utilities. Section 210 of Title II of the Act requires state regulatory authorities to implement rules promulgated by the Federal Energy Regulatory Commission under which regulated electric utilities must offer to sell electricity to and purchase electricity from qualifying cogeneration and small power production facilities.

The question presented in this case is whether these statutory provisions are within Congress' power to regulate interstate commerce and are consistent with the principle of state sovereignty embodied in the Tenth Amendment.*

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* In addition to the State of Mississippi, the Mississippi Public Service Commission was a plaintiff below. The Mississippi Power and Light Company participated as an intervenor in the proceedings before the district court.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-7a) is not yet reported.

JURISDICTION

The final judgment of the district court (App. B, *infra*, 8a-9a), was entered on February 27, 1981. The Federal Energy Regulatory Commission and the Secretary of Energy filed a joint notice of appeal to this Court on March 13, 1981 (App. C, *infra*, 10a-11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *United States* v. *Darusmont*, No. 80-243 (Jan. 12, 1981), slip op. 1; *Williams* v. *Zbaraz*, No. 79-4 (June 30, 1980), slip op. 7-9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions are set forth in App. D, *infra*, 12a-67a.

STATEMENT

A. THE STATUTORY BACKGROUND

This case concerns a challenge to the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.* (PURPA), which was enacted by Congress as part of a comprehensive package of legislation[1] designed to address the nationwide energy crisis. At the time that Congress was considering the enactment of PURPA, the generation of electrical energy consumed more than one-fourth of all energy resources used in the United States. S. Rep. No. 95-442, 95th Cong., 1st Sess. 7 (1977). Approximately one-third of all electricity in this country was generated by oil and natural gas, and electricity generation was one of the fastest growing segments of the nation's economy. S. Rep. No. 95-361, 95th Cong., 1st Sess. 32 (1977). Furthermore, electric utilities were plagued with skyrocketing fuel costs and decreasing efficiency in the use of their generating capacity, both of which had an adverse effect on rates to consumers and on the economy. S. Rep. No. 95-442, *supra*, at 9. Accordingly, Congress determined that conservation by electric util-

[1] That legislative package also included the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 *et seq.*; the National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 *et seq.*; the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 *et seq.*; and the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 *et seq.*

ities of oil and natural gas was essential to the success of any effort to lessen the nation's dependency on foreign oil, to avoid a repetition of the shortage of natural gas that the nation had experienced in the winter of 1977, and to control consumer costs.

1. *Titles I and III of PURPA*

Titles I and III of PURPA are administered (with minor exceptions) by the Secretary of Energy. The provisions of these titles are designed to encourage the adoption of certain retail regulatory policies for electric and natural gas utilities. Both titles share three common goals: (1) to promote conservation of energy supplied by utilities; (2) to optimize the efficient use of facilities and resources by utilities; and (3) to insure equitable rates to consumers. 16 U.S.C. (Supp. III) 2611; 15 U.S.C. (Supp. III) 3201. In order to achieve these goals, Titles I and III provide that state regulatory authorities and nonregulated utilities must consider the adoption and implementation of specific rate design and regulatory standards. While the Act requires the consideration of these standards, there is no requirement that any of the standards actually be adopted or implemented. See 16 U.S.C. (Supp. III) 2621(a) and 2623(a); 15 U.S.C. (Supp. III) 3203(a).[2] See also 16 U.S.C. (Supp. III) 2627(a) and (b); 15 U.S.C. (Supp. III) 3208.

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[2] For example, 16 U.S.C. (Supp. III) 2621(a) and 2623(a) state, in identical language:

> Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.

Section 111 of PURPA, 16 U.S.C. (Supp. III) 2621, requires each state regulatory authority (and each nonregulated utility) to consider whether to adopt and implement the following rate design standards: (1) Cost of service—rates for each class of electric consumers should reflect the costs of service to that class; (2) Prohibition of declining block rates;[3] (3) Time-of-day rates;[4] (4) Seasonal rates;[5] (5) Interruptible rates;[6] and (6) Development of load management techniques.[7] Consideration of these

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[3] "Declining block rates" are a traditional and still common structure used by utilities to charge for electricity. The highest unit rate is charged for basic electrical consumption, with a declining per-unit price for each block of additional consumption.

[4] "Time-of-day rates" are a technique for reducing peak load. Peak load is the greatest demand for a utility's electricity. Demand varies by hour and season, usually reaching a daily peak in the afternoon and a seasonal peak in midsummer or mid-winter. Utilities must have enough generating capacity to meet that demand; steps that reduce peak demand also reduce the required amount of generating capacity and the use of "peaking" generating equipment, which is frequently gas or oil fueled. Under time-of-day rates, utilities charge more for electricity consumed during peak load hours, usually between approximately 8 a.m. to 8 p.m.

[5] "Seasonal rates" also reduce peak load by charging higher rates for electricity consumed during the seasons when demand is greatest.

[6] "Interruptible rates" reduce peak load by charging a lower rate for electric service that the utility can interrupt, or stop, during peak demand periods.

[7] "Load management techniques" are methods used to reduce the demand for electricity at peak times. For example, utilities can use remote-control devices to turn off air conditioners, heaters or other appliances for brief times during periods when the demand for electricity is particularly high.

Each of PURPA's rate design standards is intended to communicate accurately to users the true cost of the energy they

standards was to have commenced not later than two years after PURPA's enactment, or by November 8, 1980, and a decision whether to adopt the standards is to be made by November 8, 1981. 16 U.S.C. (Supp. III) 2622(b). However, the statute does not provide for any penalties if these deadlines are not met; the state authorities or nonregulated utilities must simply consider the standards at the first rate proceeding commenced after the deadline. 16 U.S.C. (Supp. III) 2622(c).

Section 113 of the Act, 16 U.S.C. (Supp. III) 2623, requires state regulatory authorities (and nonregulated utilities) to consider a second set of standards relating to the terms and conditions of electric service: (1) Prohibition of master metering in new buildings;[8] (2) Restrictions on the use of automatic adjustment clauses;[9] (3) Disclosure to consumers

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are consuming. Time-of-day, seasonal and interruptible rates as well as load management techniques operate to reduce peak demand on a utility's generating capacity, which in turn reduces the need for construction of new power plants and the use of more expensive "peaking" generating plants which commonly burn oil or gas, consuming scarce fossil fuels. See S. Rep. No. 95-442, *supra*, at 9.

[8] "Master metering" is the use of one electric meter for multiple units. Studies have shown that tenants of master metered buildings use an average of 35% more electricity than tenants in buildings where each unit has its own individual meter. S. Rep. No. 95-442, *supra*, at 31.

[9] "Automatic adjustment clauses" provide that as a utility's fuel costs rise it may increase its rates without public hearing or review by state regulatory authorities. Because automatic adjustment clauses provide the utility with no incentive to reduce its costs or to shift from oil or gas generating facilities, they discourage the efficient use of energy resources.

of information regarding rate structures; (4) Procedural requirements relating to termination of service; and (5) Prohibition of the pass-through of advertising costs to consumers. Section 303 of Title III, 15 U.S.C. (Supp. III) 3203, requires consideration of the latter two regulatory standards with respect to natural gas utilities. Under Section 114 of the Act, 16 U.S.C. (Supp. III) 2624, each state authority (and nonregulated utility) is also required to consider whether utilities should set lower electrical rates for essential needs of residential consumers. A decision as to the standards contained in Sections 113, 114 and 303 was to have been made by November 1980, but, as with the Section 111 standards, there is no statutory penalty for failing to meet this deadline.[10]

Titles I and III prescribe certain minimal procedural requirements to be followed by state regulatory authorities and nonregulated utilities in considering the standards. For example, each of the standards is to be considered in a hearing after public notice, and a written statement of the reasons for declining to implement or adopt any of the standards is to be made available to the public. 16 U.S.C. (Supp. III) 2621(b) and (c)(2), 2623(a) and (c); 15 U.S.C. (Supp. III) 3203(a) and (c). "Any person" may bring an action in state court to enforce the obligation to hold hearings and make determinations. 16 U.S.C. (Supp. III) 2633(c)(1); 15 U.S.C. (Supp. III) 3207(b). The Secretary of Energy, affected

[10] The Act authorizes the Secretary to prescribe voluntary guidelines and provide technical assistance in order to aid the state regulatory authorities in their consideration of the Title I standards relating to electric utilities. 16 U.S.C. (Supp. III) 2641 and 2642(b).

utilities, and consumers have the right to intervene and participate in any rate-related proceeding considering the Title I standards. 16 U.S.C. (Supp. III) 2631. The Secretary alone has a right of intervention under Title III. 15 U.S.C. (Supp. III) 3205.[11] In addition, the Act provides that any person (including the Secretary) who has intervened or otherwise participated in the original proceeding may obtain review in state court of any determination made with respect to the adoption of the Title I standards. 16 U.S.C. (Supp. III) 2633(c)(1).[12] The Act prohibits the Secretary from seeking judicial review of decisions regarding the Title III standards; the Secretary is authorized, however, to participate as amicus curiae in any judicial review proceeding. 15 U.S.C. (Supp. III) 3207(b)(2).

Titles I and III also impose certain reporting requirements. Within one year after PURPA's enactment, and annually thereafter for ten years, state regulatory authorities (and nonregulated utilities) are to report the progress of their consideration of the Section 111 and 113 standards in Title I to the Secretary of Energy, who, in turn, is to submit a

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[11] The Secretary may bring an action in federal court to enforce his right to intervene. 16 U.S.C. (Supp. III) 2633 (b)(1); 15 U.S.C. (Supp. III) 3207(a)(2).

[12] Consumers who have contributed substantially to the adoption of a position that they have advocated in proceedings to consider the Title I standards are entitled to reasonable attorney's fees, expert witness fees, and other reasonable costs from the utility. Procedures governing the award of such fees and costs, or alternative means of compensating persons who would not otherwise be adequately represented, may be established by states, state regulatory authorities, or nonregulated utilities. 16 U.S.C. (Supp. III) 2632.

summary and analysis of these reports to Congress. 16 U.S.C. (Supp. III) 2626. Under Section 133, 16 U.S.C. (Supp. III) 2643, electric utilities are required to collect information concerning their cost of service. This information must be filed periodically with the Federal Energy Regulatory Commission and appropriate state regulatory agencies, and must be made available to the public. Title III requires the Secretary of Energy, in consultation with the Commission, state regulatory authorities, gas utilities and gas consumers, to submit a report to Congress on gas utility rate design. 15 U.S.C. (Supp. III) 3206.

2. *Section 210 of Title II of PURPA*

Section 210 was designed to encourage the increased development of cogeneration and small power production facilities. "Cogeneration" is the combined production of both electrical energy and useful thermal energy such as heat or steam. 16 U.S.C. (Supp. III) 796(18)(A). It includes, for example, a boiler that uses the steam it generates both to supply heat for an industrial process and to drive a turbine to generate electricity. Because cogeneration in effect involves the use of what would otherwise be waste energy, significantly less fuel is expended than would be needed to produce the two forms of energy by separate processes. A "small power production facility" is one that has a production capacity of no more than 80 megawatts and uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. 16 U.S.C. (Supp. III) 796 (17)(A).

Reliance on these sources of energy can reduce the demand for traditional fossil fuels. As Congress recognized, however, longstanding institutional im-

pediments operated to discourage the development of these facilities. First, in order to function effectively, cogeneration and small power production facilities must rely on traditional electric utilities, both as a source of backup power and as a market for the surplus power they generate. But, as Congress was aware, public utilities were not always cooperative in this regard.[13] Second, if cogeneration and small power production facilities were subject to regulation as public utilities, the complications and costs of complying with the regulatory requirements would discourage the development of these alternative energy sources.[14]

In order to alleviate the first impediment, Congress, in Section 210(a), 16 U.S.C. (Supp. III) 824a-3(a), directed the Federal Energy Regulatory Commission, in consultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities.[15] Section 210(f), 16 U.S.C. (Supp. III)

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[13] See 123 Cong. Rec. S13212 (daily ed. Aug. 1, 1977) (remarks of Sen. Percy); *id.* at S16382 (daily ed. Oct. 5, 1977) (remarks of Sen. Durkin); *id.* at S16414 (remarks of Sen. Haskell); *id.* at S16398 (remarks of Sen. Hart).

[14] See H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 98 (1978); H.R. Rep. No. 95-496 (Pt. 4), 95th Cong., 1st Sess. 157 (1977).

[15] The Commission was also directed to adopt rules to assure that the rates involved in these sales and purchases are just and reasonable. 16 U.S.C. (Supp. III) 824a-3(b) and (c). With respect to sales from the utility to the cogenerator, Congress intended "just and reasonable" to refer to tradi-

824a-3(f), requires each state regulatory authority and nonregulated utility to implement the rules adopted by the Commission under Section 210(a) regarding the purchase and sale of electricity to and from qualifying facilities. In Section 210(h), 16 U.S.C. (Supp. III) 824a-3(h), the Commission is authorized to enforce this requirement in federal court against any state authority or nonregulated utility; if the Commission does not act after being requested to do so, enforcement may be sought by an electric utility or a qualifying facility.

In Section 210(e), 16 U.S.C. (Supp. III) 824a-3(e), Congress sought to remove the second institutional barrier to development of cogeneration and small power production facilities by directing the Commission to prescribe rules under which such facilities are exempt from certain state and federal laws governing electric utilities.

Pursuant to Section 210(a), the Commission has adopted rules relating to purchases and sales of electricity to and from qualifying facilities. 18 C.F.R. Part 292; 45 Fed. Reg. 12214-12237 (1980). The Commission's regulations afford state regulatory authorities and nonregulated utilities great latitude in determining the precise manner in which to implement the requirements of these rules. 18 C.F.R.

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tional utility ratemaking concepts. With regard to purchases by the utility from the cogenerator, Congress intended that the rate should be just and reasonable to the customers of the utility and should not exceed the incremental cost to the utility of generating the additional energy itself or purchasing it from another source. In both instances Congress provided that the rates shall not discriminate against qualifying facilities, expressing concern that utilities might try to discourage sales or purchases by charging discriminatory rates. H.R. Conf. Rep. No. 95-1750, *supra*, at 98.

292.401(b). Under these regulations, state implementation may be accomplished by the issuance of regulations, by undertaking to resolve disputes between qualifying facilities and electric utilities on a case-by-case basis, or by any other action reasonably designed to give effect to the Commission's rules.[16]

Congress recognized that compliance with the requirements of PURPA would involve the expenditure of state funds. Accordingly, it authorized the Secretary of Energy to make grants to state regulatory authorities to assist them in carrying out the provisions of Titles I and II (including the reporting requirements), and the provisions of Section 210 of Title II. 42 U.S.C. (Supp. III) 6807.[17]

B. THE PROCEEDINGS BELOW

On April 24, 1979, appellees, the State of Mississippi and the Mississippi Public Service Commission, filed this action against the Secretary of Energy and the Federal Energy Regulatory Commission in the United States District Court for the Southern District of Mississippi, seeking a declaratory judgment that Titles I and III and Section 210 of Title II of PURPA are unconstitutional.[18] Appellees alleged that the Act is beyond the scope of Congress' power under

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[16] The regulations also seek to minimize Commission involvement generally by encouraging utilities and qualifying facilities to resolve problems through negotiation. 18 C.F.R. 292.301(b).

[17] Congress earmarked $40 million for each of the fiscal years 1979 and 1980 for assistance to state regulatory authorities to defray the costs of complying with PURPA. 42 U.S.C. (Supp. III) 6808.

[18] The Mississippi Power and Light Company was permitted to intervene in the action in support of the plaintiffs.

the Commerce Clause (Article I, Section 8, Clause 3) and, moreover, constitutes an invasion of state sovereignty in violation of the Tenth Amendment. In essence, they claimed that PURPA impermissibly infringes on Mississippi's ratemaking authority over intrastate sales by public utilities located in the State and that it places an intolerable burden on state public utility regulatory activities.

Following cross-motions for summary judgment by all parties, the district court initially held that PURPA exceeded Congress' powers under the Commerce Clause (App. A, *infra*, 1a-7a). In the court's view,

> [t]here is literally nothing in the Commerce Clause of the Constitution which authorizes or justifies the federal government in taking over the regulation and control of public utilities. These public utilities were actually unknown at the writing of the Constitution. * * *
>
> * * * * *
>
> The United States is simply not delegated or vested by the Constitution with the power or authority to displace and to usurp the regulatory power and authority of the state of Mississippi over these utilities in the exercise of their intrastate functions and duties with respect to their intrastate customers in Mississippi. This Act simply does not even attempt to regulate commerce among the several states but it is a clear usurpation of power and authority which the United States simply does not have under the Commerce Clause of the Constitution.

(*Id.* at 4a-7a.) The court concluded that "the United States does not have the power or authority to impose its three standards under PURPA upon

the State of Mississippi under the guise of providing the solution to the Nation's energy problems" (*id.* at 7a).

In its final judgment (App. B, *infra*, 8a-9a), issued on February 27, 1981, the district court specified that it found Titles I and III and Section 210 of Title II of PURPA unconstitutional "in that they constitute a direct intrusion on integral and traditional functions of the State of Mississippi and violate the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause * * * and [the guarantee of] a republican form of government * * *."

THE QUESTION IS SUBSTANTIAL

The district court has declared unconstitutional an Act of Congress designed to alleviate a serious threat to the economy and security of this nation. In enacting the statutory provisions at issue, Congress determined that a coordinated nationwide effort, at both the state and federal levels, is imperative to combat the energy crisis. Congress enlisted the assistance of state regulatory authorities in this effort, but in doing so, it was careful to preserve to the maximum extent possible the freedom of the state authorities to make their own decisions in the consideration of the regulatory standards established in Titles I and III and in the implementation of the Commission's cogeneration rules promulgated pursuant to Section 210 of Title II of PURPA. In its ruling, the district court ignored Congress' keen sensitivity, as revealed in the statutory scheme and the legislative history, to the principle of state sovereignty. If the district court's sweeping invalidation of PURPA's provisions were permitted to stand, it would deal a severe blow to congressional efforts to reduce this nation's de-

pendence on foreign oil by encouraging the efficient utilization of our energy resources.

The district court's ruling is incorrect for several reasons. To begin with, the court plainly misread the provisions of the Act. Contrary to the opinion below, PURPA does not authorize the federal government to take over "the regulation and control of public utilities" (App. A, *infra*, 4a). Furthermore, in enacting PURPA, Congress did not attempt to "impose its three standards" upon the State of Mississippi (*id.* at 7a). In fact, state regulatory authorities are required only to consider, not to adopt, the standards established in Titles I and III PURPA (of which there are more than three).[19] More importantly, the district court's decision fails to deal satisfactorily with the constitutional questions that this case presents. The court's holding that the statutory provisions exceed Congress' power under the Commerce Clause is at odds with numerous decisions of this Court interpreting the scope of the commerce power. Similarly, the court's conclusion that the Act intrudes upon state sovereignty in violation of the Tenth Amendment is not compelled by any of this Court's decisions.[20] Accordingly, review by this Court is warranted.

1. It can hardly be the subject of serious dispute that the Commerce Clause provides a legitimate source

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[19] The district court never identified the "three standards" to which it was referring. The court may have been referring to the three purposes of Titles I and III. 16 U.S.C. (Supp. III) 2611; 15 U.S.C. (Supp. III) 3201.

[20] In addition, neither the Supremacy Clause (Article VI, Section 2) nor the guarantee of a republican form of government (Article IV, Section 4) provides any support for the district court's holding.

of authority for the enactment of PURPA. Congress' plenary authority under the Constitution to regulate interstate commerce has been recognized since *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196-197 (1824). Subsequent cases have made it clear that Congress may regulate activities that are wholly intrastate when the intrastate activity either has a substantial effect on interstate commerce or when federal regulation of the intrastate activity is necessary to effectuate interstate regulation. See, *e.g.*, *Fry* v. *United States*, 421 U.S. 542, 547 (1975); *Perez* v. *United States*, 402 U.S. 146, 150-152 (1971); *United States* v. *Darby*, 312 U.S. 100, 118 (1941). This power includes the regulation of prices of intrastate products and activities. *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942); *Houston, East & West Texas Ry.* v. *United States*, 234 U.S. 342, 351-354 (1914).

The utilities involved in this case, the Mississippi Power and Light Company and the Mississippi Power Company, sell to their retail customers electric power that is generated in part beyond Mississippi's borders.[21] By means of a widespread interstate electric grid, Mississippi utilities draw on utilities and facilities located in other states to meet the load demands of their customers and they offer reciprocal services to utilities in other states. These activities bring the utilities regulated by the Mississippi Public Service

[21] These two companies are the only two Mississippi utilities subject to rate regulation by the State that are also subject to Title I of PURPA. See 44 Fed. Reg. 76197-76198 (1979). Both are wholly owned by multi-state public utility holding companies that operate integrated and interconnected systems in the southern states.

Commission squarely within the reach of Congress' power over interstate commerce. See *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972). The enactment of legislation that regulates intrastate sales of electricity and natural gas in order to promote efficient utilization of scarce energy resources is unquestionably a "reasonable" exercise of the power to protect interstate commerce. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258-259 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964).[22]

2. The district court's conclusion that PURPA improperly infringes upon state sovereignty in violation of the Tenth Amendment admittedly presents a more difficult question, but the opinion of the district court does not address that question in an adequate way. Congress is entitled, at the very least, to a more thoroughgoing consideration of the validity of its legislative enactments than it was afforded by the court below. See *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 20 (plurality opinion). It is our submission that, when viewed in light of the controlling constitutional principles, PURPA's carefully drafted provisions pass muster under the Tenth Amendment.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), a closely divided Court held that application of the Fair Labor Standards Act of 1938, 29

[22] See also *Oklahoma* v. *FERC*, 494 F. Supp. 636 (W.D. Okla. 1980), appeal pending, Nos. 80-1748 and 80-1824 (10th Cir.), which upheld Congress' power to impose price controls upon and otherwise to regulate wholly intrastate gas transactions under the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 *et seq.*, one of the companion statutes to PURPA.

U.S.C. 201 *et seq.*, to state employees was unconstitutional because it "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. The Court noted that the Fair Labor Standards Act would have required the payment of minimum wage and overtime pay to employees performing traditional state functions such as fire prevention, police protection, sanitation, public health, and parks and recreation. The effect of such a requirement could have been to force the states to restructure these services dramatically if they were unable to afford to comply with the Act and maintain the existing work force. *Id.* at 851.

It is clear that the risk of displacement of state decisions about traditional state functions that troubled the court in *Usery* is not present under PURPA. To begin with, the regulation of public utilities is not analogous to the traditional state functions described as typical in *Usery*: fire prevention, police protection, sanitation, public health, and parks and recreation. In fact, joint federal and state jurisdiction over public utilities has existed since the passage of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063. It is settled that the states have no independent constitutional authority to regulate the sale and transmission of wholesale electric energy in interstate commerce. As the public utility system developed, federal involvement has been deemed necessary to fill gaps in state regulatory systems that were interpreted by the courts as beyond the constitutional reach of state authorities. *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 213-214 (1964); *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 89-90

(1927). In areas of concurrent federal and state responsibility, Congress cannot fairly be said to be interfering with an "integral" state program when it exercises its own constitutional power. See *Friends of the Earth* v. *Carey*, 552 F.2d 25, 38 (2d Cir.), cert. denied, 434 U.S. 902 (1977).

Moreover, the degree of displacement of state decisionmaking under PURPA does not rise to the level found constitutionally objectionable in *Usery*. The Court in *Usery* did not purport to impose an absolute bar on all federal action that might affect traditional state functions. This is evident by the manner in which the Court distinguished its previous holding in *Fry* v. *United States*, *supra*, which had upheld the authority of Congress, in the Economic Stabilization Act of 1970, to impose a temporary freeze on the wages of state and local government employees. The Court stressed that the statute at issue in *Fry* was enacted in response to "an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall." 426 U.S. at 853. Second, it noted that "[t]he means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time." *Ibid.* In addition, the Court observed that the Economic Stabilization Act of 1970 "displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves." *Ibid.*[28] The Court observed in conclusion that "[t]he limits imposed upon the commerce power when Congress

[28] Furthermore, the Court pointed out that the statute under consideration in *Fry* operated to reduce rather than increase the pressures on state budgets. 426 U.S. at 853.

seeks to apply it to the States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency." 426 U.S. at 853.

The fact that the Court in *Usery* did not establish a rigid rule is confirmed by the concurring opinion of Justice Blackmun, whose vote was necessary to form a majority of the Court:

> * * * [I]t seems to me that [the Court's opinion] adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential. * * * With this understanding on my part of the Court's opinion, I join it.

Id. at 856. Following the decision in *Usery*, several courts of appeals have employed a balancing approach in assessing the constitutionality, under the Tenth Amendment, of federal legislation or regulations that impose certain requirements upon the states. See *United States* v. *Ohio Dep't of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980), petition for cert. pending, No. 80-1289 (filed Jan. 30, 1981); *United Transportation Union* v. *Long Island R.R.*, 634 F.2d 19, 24, 29-30 (2d Cir. 1980); *Peel* v. *Florida Dep't of Transportation*, 600 F.2d 1070, 1082-1085 (5th Cir. 1979); *Public Service Co.* v. *FERC*, 587 F.2d 716, 721 (5th Cir. 1979); *Friends of the Earth* v. *Carey*, *supra*, 552 F.2d at 37-39.

The provisions at issue here are clearly sustainable under the test employed by this Court in *Usery*. The nation's energy problem—both in 1978, when PURPA was enacted, and today— is as serious a national problem as was the inflation problem that triggered the

legislation involved in *Fry*. The legislative history of PURPA shows Congress' deep concern about the nation's increasing dependence on imported oil as a threat to our national interests. In its report on the National Energy Act, in which PURPA was included, the House Ad Hoc Committee on Energy stated that "[t]he fundamental problem for U.S. energy policy is the insecurity of its oil suppy." H.R. Rep. No. 95-543, 95th Cong., 1st Sess. 5 (1977). In 1970, the United States imported 23% of its oil. By 1976, this percentage had increased to 42%, and it was expected to continue rising. The Ad Hoc Committee noted that "[s]uch an increase in our reliance on oil imports would greatly constrain our foreign policy and could do considerable damage to our economy." *Ibid.*

Problems in the electric utility industry, particularly declining efficiency, were contributing heavily to increased consumption of foreign oil. See S. Rep. No. 95-442, *supra*, at 7. These problems included "declining load factors, increasing fuel costs, rapidly rising costs of new capacity, lower than expected powerplant reliability and a virtual end to the economies of scale associated with increasing sizes of generating plants." H.R. Rep. No. 95-496 (Pt. 4), 95th Cong., 1st Sess. 129 (1977).[24] Moreover, these problems of declining efficiency resulted in higher energy bills for consumers. Some states and utilities had begun experimenting with rate design methodol-

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[24] Load factor, which is the ratio of average utility load to peak load, is used to measure a utility's efficiency. The average national load factor declined between 1965 and 1977, reflecting a "substantial reduction" in the efficiency of the use of existing generating plants. H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 129.

ogies to improve efficiency and lower the public's bills; however, many states and utilities had not changed their previous practice and were not expected to do so without federal action, for fear of jeopardizing their economic base and because of the lack of necessary cost data and technical expertise. H.R. Rep. No. 95-496 (Pt. 4), *supra*, at 129-130.

Thus, PURPA was enacted in reaction to "an extremely serious problem" that endangered the entire nation and that required "collective action by the National Government." *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 853. Furthermore, "[t]he means selected were carefully drafted so as not to interfere with the States' freedom" except in a limited way, and the Act does not "displace[] * * * state choices as to how governmental operations should be structured." *Ibid.*[25]

Titles I and III of PURPA do not displace the state's basic authority to design a public utility rate structure that is responsive to state needs. In Titles I and III Congress did not grant federal authorities the power to force any particular substantive choices upon a state; rather, the Act clearly provides that the states are free to choose whether or not to adopt or implement any of the federal standards. 16 U.S.C. (Supp. III) 2621(a), 2623(a), 2627(a) and (b); 15 U.S.C. (Supp. III) 3203(a) and 3208.

Although Congress could have preempted state regulation of electric and gas utilities, it chose not to do

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[25] In addition, unlike the statute under consideration in *Usery*, PURPA imposes only a minimal economic burden upon the states, and Congress has acted to reduce that burden by authorizing the Secretary of Energy to provide grants to assist state regulatory authorities in carrying out the provisions of PURPA at issue here (see page 11 & note 17, *supra*).

so. The provisions of PURPA and the legislative history reflect an overriding intent on the part of Congress to permit state officials to retain authority over regulatory policies with respect to retail sales of electricity and natural gas. See S. Rep. No. 95-442, *supra*, at 9, 13-14. As Senator Jackson remarked in presenting the Conference Report to the Senate:

> The conference bill leaves intact the authority and discretion of the State commissions and nonregulated municipal and cooperative utilities with respect to ratemaking. These entities would be required to examine a series of federally recognized ratemaking standards in hearings with opportunity for input from affected utilities and consumers. This examination would determine the relationship between each of these standards and the purposes of the act: conservation, efficiency in the use of facilities, and equitable rates. Following such examination each State commission or nonregulated utility would be free to choose whether or not the standard would be put into effect.

124 Cong. Rec. S17528 (daily ed. Oct. 7, 1978).

Moreover, the hearings on the PURPA standards are to be conducted in accordance with state procedures, except that the minimum due process elements—notice, and a public statement of reasons in support of a determination—must be provided. However, Mississippi law already provides for reasonable notice (Miss. Code Ann. § 77-3-33 (1973)), and requires the Public Service Commission to keep a "full and complete record" of all hearings (Miss. Code Ann. § 77-3-63 (1973) and to "make and file its findings and order, and its opinion, if any." Miss. Code Ann. § 77-3-59 (1973). Furthermore, under state law "[a]ll findings shall be supported by substantial evidence presented in the hearing and

shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding, and the basis of the commission's conclusion" (Miss. Code Ann. § 77-3-59 (1973)). Thus, the proceedings of the Mississippi Public Service Commission need not be altered significantly, if at all, to meet the requirements of PURPA.

If a state regulatory authority decides to adopt one or more of the federal standards, it has full discretion to determine the manner of implementation. Congress intended that the standards be adapted to local needs; they may be partially implemented or phased-in, and exceptions or other means may be provided to alleviate any resulting hardships. H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 13, 16 (1978). In addition, states and utilities that had already considered the rate design and other standards prior to enactment of PURPA need not repeat the consideration process so long as the initial proceeding was in substantial conformance with PURPA's requirements. 16 U.S.C. (Supp. III) 2634; 15 U.S.C. (Supp. III) 3210.[26]

In drafting the provisions of Section 210 of Title II, Congress was also careful to minimize federal interference with state governmental functions. Congress has traditionally left to the states the regulation of retail sales of electricity, as well as the intrastate

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[26] Congress recognized that regulatory commissions could not have anticipated the Act's procedural provisions, and noted that not having permitted intervention and participation by the Secretary or affected consumers and utilities would not "automatically constitute the absence of substantial conformance." H.R. Conf. Rep. No. 95-1750, *supra*, at 85.

transmission of electric power incident thereto. As part of its comprehensive national energy program, however, Congress believed that it was essential to encourage the development of cogeneration and small power production. In order to foster that development, Congress determined that it was necessary to require utilities to supply back-up power to, and purchase surplus power from, these facilities. While the sale from a qualifying facility to a utility is a wholesale transaction,[27] the sale of back-up power by the utility is a retail transaction. Congress met the challenge presented by this novel situation not by preempting state authority to regulate retail sales but by choosing a middle ground, adopting "a pact based on cooperative federalism." *Friends of the Earth* v. *Carey, supra*, 552 F.2d at 37.

The obligations imposed upon the states to effectuate Section 210 are minimal. Like Titles I and III, Section 210 of the Act does not require the states to establish a public service commission or to extend state jurisdiction to utilities that are not subject to state regulation. Although state regulatory authorities are required to implement the rules promulgated by the Commission pursuant to Section 210, the state authorities have considerable discretion in deciding how to implement the rules (see pages 10-11, *supra*). This flexible scheme permits each state authority to be responsive to local needs in the area of cogeneration and small power production and to accommodate the regulatory program to the authority's own internal structure and practices.

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[27] The jurisdiction of the Federal Energy Regulatory Commission over wholesale electric rates, as well as its authority over utility interconnections, are well established. See *FPC* v. *Florida Power & Light Co., supra*, 404 U.S. at 458-459.

The benefits of the approach adopted by Congress in Section 210 are manifest. The program is in its infancy and demands flexibility, with room for experimentation and adaptation to local conditions, if the purpose of encouraging development of these supplementary sources of power is to be realized. The program's ultimate success depends in large measure on the cooperation of small producers and industrial cogenerators. It is not unreasonable to believe that these suppliers will be less hesitant to enter this new field if they know that they can turn to state officials to resolve any disputes that may arise with utilities, rather than having to deal with federal officials in Washington.

In sum, the provisions of PURPA, which were enacted "to combat a national emergency" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 853), impose only a minimal burden on the states in an area in which the federal government has concurrent responsibility, and do not "impair the States' 'ability to function effectively in a federal system.'" *Id.* at 852, quoting from *Fry* v. *United States*, *supra*, 421 U.S. at 547 n.7. The district court therefore erred in holding these provisions unconstitutional.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

KATHRYN A. OBERLY
SUSAN V. COOK
Attorneys

JEROME NELSON
Acting General Counsel

JEROME M. FEIT
Deputy Solicitor

JOANNE LEVEQUE
Attorney
Federal Energy Regulatory Commission

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J79-0212(C)

THE STATE OF MISSISSIPPI, ET AL., PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL., DEFENDANTS

MISSISSIPPI POWER & LIGHT COMPANY, INTERVENOR

JUDGMENT

This action was instituted by the state of Mississippi and its Mississippi Public Service Commission with its three commissioners, all acting by and through the Attorney General of the State of Mississippi. The suit attacks the constitutional validity of the three standards in the Federal Regulatory Act known as PURPA which usurps and dispells the intrastate jurisdiction and activity of the Mississippi Public Service Commission as provided by § 77-3-5, Mississippi Code 1972. The defendants have thus passed the Public Utilities Regulatory Policy Act of 1978 (PURPA) as one of five statutes signed into law on November 9, 1978 as part of a broad effort to solve the nation's energy problems. For more than a hundred years of legislative and judicial activity, the Mississippi Public Service Commission has been vested by state statute with the approval of the Supreme Court of the state of Mississippi from time to time, which vested this commission with the approval,

power and authority to regulate and control intrastate activities and policies of all utilities operating within the sovereign state of Mississippi. That conclusion and that long established and well recognized basis of the jurisdiction of this Commission has been accepted and approved by profound lawyers and courts alike since memory of man runneth not to the contrary.

The sovereign state of Mississippi is one of the indissoluble members of this alliance with the federal government which has worked so well from its inception.[1]

The sovereign state of Mississippi is not a robot, or lackey which may be shuttled back and forth to suit the whim and caprice of the federal government, but was and is the prime benefactor of the power and authority designated by the Constitution and allocated as desired by this instrument as the supreme law of the land.[2]

The power and authority of the Constitution thus demonstrates that the United States is designated as an agency of expressly conferred powers, and for clarification, further demonstrates that those powers

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[1] Article IV, Sect. 4 of the Constitution of the United States provides: "The United States shall guarantee to every state in this union a Republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

[2] Article X of the Amendments to the Constitution of the United States provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

not expressly conferred are withheld and reserved unto the states and to the people.[3]

In 1936, the Supreme Court in deciding *Carter* v. *Carter Coal Co. et al*, 298 U.S. 238, 56 S. Ct. 855 at page 865-866 said of the fixed balance intended by the Constitution for the regulation of this dual relationship: "It is no longer open to question that the general government, unlike the states, Hammer v. Dagenhart, 247 U.S. 251, 275, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A.L.R. 649, Ann.Cas. 1918E, 724, possesses no inherent power in respect of the internal affairs of the states; and emphatically not with regard to legislation. * * * Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

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[3] On January 4, 1886, the case of *Stone et al, composing the Railroad Commission of the State of Mississippi* v. *Farmers' Loan & Trust Co.*, 116 U.S. 307, 6 S.Ct. 334 the Court said: "It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction."

Mr. Justice Sutherland held that Congress had no power or authority to regulate anything which is not commerce and, significantly, that the Congress had no power to do anything about commerce which is not regulation. He held at page 867 of the *Carter* v. *Carter Coal Co., supra,* that "Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation."

There is literally nothing in the Commerce Clause of the Constitution which authorizes or justifies the federal government in taking over the regulation and control of public utilities. These public utilities were actually unknown at the writing of the Constitution. There is literally nothing to be found anywhere in the Commerce Clause which would authorize or justify the United States in replacing the Public Service Commission and start the regulation of telephones, natural gas and other such utilities as the Public Service Commission has done extensively on evidence and in furtherance of the local public interest. The states have uniformly and invariably treated such intrastate operation as the governmental activities of these utilities.

Significantly, *Maryland et al* v. *Wirtz, Secretary of Labor,* 392 U.S. 183, 88 S.Ct. 2017 overruled by the Supreme Court on June 24, 1976 in which in the original case Mr. Justice Douglas dissented said at page 2028: "If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment. The principles which should guide us in this case are set forth in the several opinions in State of New York v. United States, supra. As Mr. Chief Justice Stone said there, the National

Government may not 'interfere unduly with the State's performance of its sovereign functions of government.' 326 U.S., at 587, 66 S.Ct. at 316. It may not 'impair the State's functions of government,' id., at 594, 66 S.Ct., at 320 (dissenting opinion of Mr. Justice Douglas, joined by Mr. Justice Black)."

In 1974, the Congress enacted a Fair Labor Standards Act which embraced cities and states, contrary to the original 1938 Act. An action was brought in the district court to challenge the constitutional validity of that act under the provision of the Constitution which guaranteed to every state the Republican form of government, and under the Tenth Amendment to the Constitution on the ground that neither was that power expressly granted or delegated to the United States, or prohibited by it to the states. In obedience to the decision of the Supreme Court in the *Wirtz* case, supra, the District Court rendered its decision adverse to the contentions made here with a dissent by Justice Douglas.[4]

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[4] In the *National League of Cities et al* v. *W. J. Usery, Jr., Secretary of Labor*, 426 U.S. 833, 96 S.Ct. 2465, 2471, 2474 where the Court said among other things: "It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

* * * "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must

Congress is given the power by Article I, Sect. 8 "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

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resolve here, then, is whether these determinations are 'functions essential to separate an independent existence,' id., at 580, 31 S.Ct., at 695, quoting from Lane County v. Oregon, supra, 7 Wall. at 76, so that Congress may not abrogate the States' otherwise plenary authority to make them."

* * * "Thus, even if appellants may have overestimated the effect which the Act will have upon their current levels and patterns of governmental activity, the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system.' Fry, 421 U.S., at 547, 95 S.Ct., at 1796 n.7. This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. 1, § 8, cl. 3."

* * * "But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. We think the dicta from United States v. California, simply wrong. Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power if unchecked, would indeed, as Mr. Justice Douglas cautioned in his dissent in Wirtz, allow 'the National Government [to] devour the essentials of state sovereignty,' 392 U.S., at 205, 88 S.Ct., at 2028, and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause."

Mr. Justice Rehnquist delivered the majority opinion of the court.

The United States is simply not delegated or vested by the Constitution with the power or authority to displace and to usurp the regulatory power and authority of the state of Mississippi over these utilities in the exercise of their intrastate functions and duties with respect to their intrastate customers in Mississippi. This Act simply does not even attempt to regulate commerce among the several states but it is a clear usurpation of power and authority which the United States simply does not have under the Commerce Clause of the Constitution.

This Court has read and considered extensive authorities on this question and is left with the firm view and conclusion that the United States does not have the power or authority to impose its three standards under PURPA upon the state of Mississippi under the guise of providing the solution to the nation's energy problems. There is before the Court no genuine issue of material fact and these movants are thus entitled to a judgment in their favor as a matter of law.

The motion of *The State of Mississippi et al*, and the motion of the *Mississippi Power and Light Company*, as intervenor, for a summary judgment are well taken and each is hereby granted. There will be no assessment of costs in this case.

ORDERED AND ADJUDGED, this February 19, A.D., 1981.

/s/ Harold Cox
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J79-0212(C)

THE STATE OF MISSISSIPPI, ET AL., PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL., DEFENDANTS

MISSISSIPPI POWER & LIGHT COMPANY, INTERVENOR

FINAL JUDGMENT

This cause coming on to be heard on the Motions of Plaintiffs and Intervenor for summary judgment and Cross-Motions of the Defendants for summary judgment, all pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, and the Court having considered the pleadings in this action, the Interrogatories and Answers thereto, the Affidavits filed herein, and having read and considered the Briefs of all parties, and having heard oral argument, and being now fully advised in the premises, and after due deliberation having been had thereon, and after issuing its Opinion finding that Title I, Section 210 of Title II, and Title III of the Public Utility Regulatory Policies Act of 1978, Public Law 95-617, 92 Stat. 3119, 16 U.S.C. § 2601, are unconstitutional and void in that they constitute a direct intrusion on integral

and traditional functions of the State of Mississippi and violate the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause [Article VI, Section 2] and a republican form of government as guaranteed by Article IV, Section 4; it is, therefore,

ORDERED AND ADJUDGED that Title I, Section 210 of Title II, and Title III of the Public Utility Regulatory Policies Act of 1978 are unconstitutional and void and that Plaintiffs' and Intervenor's Motions for Summary Judgment be and the same are hereby granted, and it is further

ORDERED AND ADJUDGED that Defendants' Cross-Motions for Summary Judgment be and the same are hereby denied, with no costs to be assessed to any party.

ORDERED AND ADJUDGED this the 27 of February, 1981.

/s/ Harold Cox
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

J79-0212(C)

THE STATE OF MISSISSIPPI, ET AL., PLAINTIFFS

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY, DEFENDANTS

MISSISSIPPI POWER & LIGHT COMPANY, INTERVENORS

[Filed March 13, 1981]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is being given that the Federal Energy Regulatory Commission and the Secretary of Energy, defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the Judgment entered February 20, 1981, and the Final Judgment entered February 27, 1981, declaring Title I, Title III, and Section 210 of Title II of the Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3120-3134, 3144-3147 and 3149-3154, to be unconstitutional and void.

This appeal is taken pursuant to 28 U.S.C. § 1252.

GEORGE PHILLIPS
United States Attorney

/s/ Jerome M. Feit
JEROME M. FEIT
Deputy Solicitor
Federal Energy Regulatory Commission
Washington, D.C. 20426

/s/ L. A. Smith III
L. A. SMITH III
Assistant United States Attorney

/s/ Susan V. Cook
KATHRYN A. OBERLY
SUSAN V. COOK
Attorneys, Department of Justice
Washington, D.C. 20530

Dated March 13, 1981

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.*, provides in pertinent part:

TITLE I (16 U.S.C. (Supp. II) 2601 *et seq.*)

§ 2601. Findings

The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require—

(1) a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers,

(2) a program to improve the wholesale distribution of electric energy, the reliability of electric service, the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission, the participation of the public in matters before the Commission, and to provide other measures with respect to the regulation of the wholesale sale of electric energy,

(3) a program to provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power,

(4) a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable,

(5) a program to encourage the development of crude oil transportation systems, and

(6) the establishment of certain other authorities as provided in title VI of this Act.

§ 2602. Definitions

As used in this Act, except as otherwise specifically provided—

(1) The term "antitrust laws" includes the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, the Wilson Tariff Act, and the Act of June 19, 1936, chapter 592.

(2) The term "class" means, with respect to electric consumers, any group of such consumers who have similar characteristics of electric energy use.

(3) The term "Commission" means the Federal Energy Regulatory Commission.

(4) The term "electric utility" means any person, State agency, or Federal agency, which sells electric energy.

(5) The term "electric consumer" means any person, State agency, or Federal agency, to which electric energy is sold other than for purposes of resale.

(6) The term "evidentiary hearing" means—

(A) in the case of a State agency, a proceeding which (i) is open to the public, (ii) includes notice to participants and an opportunity for such participants to present direct and rebuttal evidence and to cross-examine witnesses, (iii) includes a written decision, based upon evidence appearing in a written record of the proceeding, and (iv) is subject to judicial review;

(B) in the case of a Federal agency, a proceeding conducted as provided in sections 554, 556, and 557 of Title 5; and

(C) in the case of a proceeding conducted by any entity other than a State or Federal agency, a proceeding which conforms, to the extent appropriate, with the requirements of subparagraph (A).

(7) The term "Federal agency" means an executive agency (as defined in section 105 of Title 5).

(8) The term "load management technique" means any technique (other than a time-of-day or seasonal rate) to reduce the maximum kilowatt demand on the electric utility, including ripple or radio control mechanisms, and other types of interruptible electric service, energy storage devices, and load-limiting devices.

(9) The term "nonregulated electric utility" means any electric utility other than a State regulated electric utility.

(10) The term "rate" means

(A) any price, rate, charge, or classification made, demanded, observed, or received with respect to sale of electric energy by an electric utility to an electric consumer,

(B) any rule, regulation, or practice respecting any such rate, charge, or classification, and

(C) any contract pertaining to the sale of electric energy to an electric consumer.

(11) The term "ratemaking authority" means authority to fix, modify, approve, or disapprove rates.

(12) The term "rate schedule" means the designation of the rates which an electric utility charges for electric energy.

(13) The term "sale" when used with respect to electric energy includes any exchange of electric energy.

(14) The term "Secretary" means the Secretary of Energy.

(15) The term "State" means a State, the District of Columbia, and Puerto Rico.

(16) The term "State agency" means a State, political subdivision thereof, and any agency or instrumentality of either.

(17) The term "State regulatory authority" means any State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility (other than such State agency), and in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority, such term means the Tennessee Valley Authority.

(18) The term "State regulated electric utility" means any electric utility with respect to which a State regulatory authority has ratemaking authority.

§ 2603. Relationship to antitrust laws

Nothing in this Act or in any amendment made by this Act affects—

(1) the applicability of the antitrust laws to any electric utility or gas utility (as defined in section 3202 of Title 15), or

(2) any authority of the Secretary or of the Commission under any other provision of law (including the Federal Power Act and the Natural Gas Act) respecting unfair methods of competition or anticompetitive acts or practices.

SUBCHAPTER I—RETAIL REGULATORY POLICIES FOR ELECTRIC UTILITIES

§ 2611. Purposes

The purposes of this chapter are to encourage—

(1) conservation of energy supplied by electric utilities;

(2) the optimization of the efficiency of use of facilities and resources by electric utilities; and

(3) equitable rates to electric consumers.

§ 2612. Coverage

(a) Volume of total retail sales.—This chapter applies to each electric utility in any calendar year, and to each proceeding relating to each electric utility in such year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(b) Exclusion of wholesale sales.—The requirements of this chapter do not apply to the operations of an electric utility, or to proceedings respecting such operations, to the extent that such operations or proceedings relate to sales of electric energy for purposes of resale.

(c) List of covered utilities.—Before the beginning of each calendar year, the Secretary shall publish a list identifying each electric utility to which this chapter applies during such calendar year. Promptly after publication of such list each State regulatory authority shall notify the Secretary of each electric utility on the list for which such State regulatory authority has ratemaking authority.

§ 2613. Federal contracts

Notwithstanding the limitation contained in section 2612(b) of this title, no contract between a Fed-

eral agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into or renewed after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any requirement of subchapter II or III of this chapter. Any provision in any such contract which has such effect shall be null and void.

SUBCHAPTER II—STANDARDS FOR ELECTRIC UTILITIES

§ 2621. Consideration and determination respecting certain ratemaking standards

(a) Consideration and determination.—Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall consider each standard established by subsection (d) of this section and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this chapter. For purposes of such consideration and determination in accordance with subsections (b) and (c) of this section, and for purposes of any review of such consideration and determination in any court in accordance with section 2633 of this title, the purposes of this chapter supplement otherwise applicable State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.

(b) Procedural requirements for consideration and determination.—

(1) The consideration referred to in subsection (a) of this section shall be made after public notice and hearing. The determination referred to in subsection (a) of this section shall be—

(A) in writing,

(B) based upon findings included in such determination and upon the evidence presented at the hearing, and

(C) available to the public.

(2) Except as otherwise provided in paragraph (1), in the second sentence of section 2622(a) of this title, and in sections 2631 and 2632 of this title, the procedures for the consideration and determination referred to in subsection (a) of this section shall be those established by the State regulatory authority or the nonregulated electric utility.

(c) Implementation.—

(1) The State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility may, to the extent consistent with otherwise applicable State law—

(A) implement any such standard determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, or

(B) decline to implement any such standard.

(2) If a State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility declines to implement any standard established by subsection (d) of this section which is determined under subsection (a) of this section to be appropriate to carry out the purposes of this chapter, such authority or nonregulated electric utility shall state in writing the reasons therefor. Such statement of reasons shall be available to the public.

(d) Establishment.—The following Federal standards are hereby established:

(1) Cost of service.—Rates charged by any electric utility for providing electric service to each class of electric consumers shall be designed, to the maximum extent practicable, to reflect the costs of providing electric service to such class, as determined under section 2625(a) of this title.

(2) Declining block rates.—The energy component of a rate, or the amount attributable to the energy component in a rate, charged by any electric utility for providing electric service during any period to any class of electric consumers may not decrease as kilowatt-hour consumption by such class increases during such period except to the extent that such utility demonstrates that the costs of such utility of providing electric service to such class, which costs are attributable to such energy component, decrease as such consumption increases during such period.

(3) Time-of-day rates.—The rates charged by any electric utility for providing electric service to each class of electric consumers shall be on a time-of-day basis which reflects the costs of providing electric service to such class of electric consumers at different times of the day unless such rates are not cost-effective with respect to such class, as determined under section 2625(b) of this title.

(4) Seasonal rates.—The rates charged by an electric utility for providing electric service to each class of electric consumers shall be on a seasonal basis which reflects the costs of providing service to such class of consumers at different seasons of the year to the extent that such costs vary seasonally for such utility.

(5) Interruptible rates.—Each electric utility shall offer each industrial and commercial electric consumer an interruptible rate which reflects the cost of providing interruptible service to the class of which such consumer is a member.

(6) Load management techniques.—Each electric utility shall offer to its electric consumers such load management techniques as the State regulatory authority (or the nonregulated electric utility) has determined will—

(A) be practicable and cost-effective, as determined under section 2625(c) of this title,

(B) be reliable, and

(C) provide useful energy or capacity management advantages to the electric utility.

§ 2622. Obligations to consider and determine

(a) Request for consideration and determination.—Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility may undertake the consideration and make the determination referred to in section 2621 of this title with respect to any standard established by section 2621(d) of this title in any proceeding respecting the rates of the electric utility. Any participant or intervenor (including an intervenor referred to in section 2631 of this title) in such a proceeding may request, and shall obtain, such consideration and determination in such proceeding. In undertaking such consideration and making such determination in any such proceeding with respect to the application to any electric utility of any standard established by section 2621(d) of this title, a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or nonregulated electric utility may take into account in such proceeding—

(1) any appropriate prior determination with respect to such standard—

(A) which is made in a proceeding which takes place after November 9, 1978, or

(B) which was made before such date (or is made in a proceeding pending on such date) and complies, as provided in section 2634 of this title, with the requirements of this chapter; and

(2) the evidence upon which such prior determination was based (if such evidence is referenced in such proceeding).

(b) Time limitations.—

(1) Not later than 2 years after November 9, 1978, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall commence the consideration referred to in section 2621 of this title, or set a hearing date for such consideration, with respect to each standard established by section 2621(d) of this title.

(2) Not later than three years after November 9, 1978, each State regulatory authority (with respect to each electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall complete the consideration, and shall make the determination, referred to in section 2621 of this title with respect to each standard established by section 2621(d) of this title.

(c) Failure to comply.—Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility shall undertake the consideration, and make the determination, referred to in section 2621 of this title with respect to each standard established by section 2621(d) of this title in the first rate proceeding commenced after the date three years after November 9, 1978, respecting the rates of such utility if such State regulatory authority

(c) Procedural requirements.—Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated electric utility, within the two-year period specified in subsection (a) of this section, shall (1) adopt, pursuant to subsection (a) of this section, each of the standards established by subsection (b) of this section or, (2) with respect to any such standard which is not adopted, such authority or nonregulated electric utility shall state in writing that it has determined not to adopt such standard, together with the reasons for such determination. Such statement of reasons shall be available to the public.

§ 2624. Lifeline rates

(a) Lower rates.—No provision of this chapter prohibits a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or a nonregulated electric utility from fixing, approving, or allowing to go into effect a rate for essential needs (as defined by the State regulatory authority or by the nonregulated electric utility, as the case may be) of residential electric consumers which is lower than a rate under the standard referred to in section 2621(d)(1) of this title.

(b) Determination.—If any State regulated electric utility or nonregulated electric utility does not have a lower rate as described in subsection (a) of this section in effect two years after November 9, 1978, the State regulatory authority having ratemaking authority with respect to such State regulated electric utility or the nonregulated electric utility, as the case may

be, shall determine, after an evidentiary hearing, whether such a rate should be implemented by such utility.

(c) Prior proceedings.—Section 2634 of this title shall not apply to the requirements of this section.

§ 2625. Special Rules for standards

(a) Cost of Service.—In undertaking the consideration and making the determination under Section 2621 of this title, with respect to the standard concerning cost of service established by Section 2621(d)(1) of this title, the costs of providing electric service to each class of electric consumers shall, to the maximum extent practicable, be determined on the basis of methods prescribed by the State regulatory authority (in the case of a State regulated electric utility) or by the electric utility (in the case of a nonregulated electric utility). Such methods shall to the maximum extent practicable—

(1) permit identification of differences in cost-incurrence, for each such class of electric consumers, attributable to daily and seasonal time of use of service and

(2) permit identification of differences in cost-incurrence attributable to differences in customer demand, and energy components of cost. In prescribing such methods, such State regulatory authority or nonregulated electric utility shall take into account the extent to which total costs to an electric utility are likely to change if—

(A) additional capacity is added to meet peak demand relative to base demand; and

(B) additional kilowatt-hours of electric energy are delivered to electric consumers.

(b) Time-of-day rates.—In undertaking the consideration and making the determination required under section 2621 of this title with respect to the standard for time-of-day rates established by section 2621(d)(3) of this title, a time-of-day rate charged by an electric utility for providing electric service to each class of electric consumers shall be determined to be cost-effective with respect to each such class if the long-run benefits of such rate to the electric utility and its electric consumers in the class concerned are likely to exceed the metering costs and other costs associated with the use of such rates.

(c) Load management techniques.—In undertaking the consideration and making the determination required under section 2621 of this title with respect to the standard for load management techniques established by section 2621(d)(6) of this title, a load management technique shall be determined, by the State regulatory authority or nonregulated electric utility, to be cost-effective if—

(1) such technique is likely to reduce maximum kilowatt demand on the electric utility, and

(2) the long-run cost-savings to the utility of such reduction are likely to exceed the long-run costs to the utility associated with implementation of such technique.

(d) Master metering.—Separate metering shall be determined appropriate for any new building for purposes of section 2623(b)(1) of this title if—

(1) there is more than one unit in such building,

(2) the occupant of each such unit has control over a portion of the electric energy used in such unit, and

(3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.

(e) Automatic adjustment clauses.—

(1) An automatic adjustment clause of an electric utility meets the requirements of this subsection if—

(A) such clause is determined, not less often than every four years, by the State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or by the electric utility (in the case of a nonregulated electric utility), after an evidentiary hearing, to provide incentives for efficient use of resources (including incentives for economical purchase and use of fuel and electric energy) by such electric utility, and

(B) such clause is reviewed not less often than every two years, in the manner described in paragraph (2), by the State regulatory authority having rate-

making authority with respect to such utility (or by the electric utility in the case of a nonregulated electric utility), to insure the maximum economies in those operations and purchases which affect the rates to which such clause applies.

(2) In making a review under subparagraph (B) of paragraph (1) with respect to an electric utility, the reviewing authority shall examine and, if appropriate, cause to be audited the practices of such electric utility relating to costs subject to an automatic adjustment clause, and shall require such reports as may be necessary to carry out such review (including a disclosure of any ownership or corporate relationship between such electric utility and the seller to such utility of fuel, electric energy, or other items).

(3) As used in this subsection and section 2623(b) of this title, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include an interim rate which takes effect subject to a later determination of the appropriate amount of the rate.

(f) Information to consumers.—

(1) For the purposes of the standard for information to consumers established by

section 2623(b)(3) of this title, each electric utility shall transmit to each of its electric consumers a clear and concise explanation of the existing rate schedule and any rate schedule applied for (or proposed by a nonregulated electric utility) applicable to such consumer. Such statement shall be transmitted to each such consumer—

(A) not later than sixty days after the date of commencement of service to such consumer or ninety days after the standard established by section 2623(b)(3) of this title is adopted with respect to such electric utility, whichever last occurs, and

(B) not later than thirty days (sixty days in the case of an electric utility which uses a bimonthly billing system) after such utility's application for any change in a rate schedule applicable to such consumer (or proposal of such a change in the case of a nonregulated utility).

(2) For purposes of the standard for information to consumers established by section 2623(b)(3) of this title, each electric utility shall transmit to each of its electric consumers not less frequently than once each year—

(A) a clear and concise summary of the existing rate schedules applicable to each of the major classes of its electric consumers for which there is a separate rate, and

(B) an identification of any classes whose rates are not summarized.

Such summary may be transmitted together with such consumer's billing or in such other manner as the State regulatory authority or nonregulated electric utility deems appropriate.

(3) For purposes of the standard for information to consumers established by section 2623(b)(3) of this title, each electric utility, on request of an electric consumer of such utility, shall transmit to such consumer a clear and concise statement of the actual consumption (or degree-day adjusted consumption) of electric energy by such consumer for each billing period during the prior year (unless such consumption data is not reasonably ascertainable by the utility).

(g) Procedures for termination of electric service.—The procedures for termination of service referred to in section 2623(b)(4) of this title are procedures prescribed by the State regulatory authority (with respect to electric utilities for which it has ratemaking authority) or by the nonregulated electric utility which provide that—

(1) no electric service to an electric consumer may be terminated unless reasonable prior notice (including notice of rights and remedies) is given to such consumer and such consumer has a reasonable opportunity to dispute the reasons for such termination,

(2) during any period when termination of service to an electric consumer would be especially dangerous to health, as deter-

mined by the State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or nonregulated electric utility, and such consumer establishes that—

(A) he is unable to pay for such service in accordance with the requirements of the utility's billing, or

(B) he is able to pay for such service but only in installments, such service may not be terminated.

Such procedures shall take into account the need to include reasonable provisions for elderly and handicapped consumers.

(h) Advertising.—

(1) For purposes of this section and section 2623(b)(5) of this title—

(A) The term "advertising" means the commercial use, by an electric utility, of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to such utility's electric consumers.

(B) The term "political advertising" means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any controversial issue of public importance.

(C) The term "promotional advertising" means any advertising for the

purpose of encouraging any person to select or use the service or additional service of an electric utility or the selection or installation of any appliance or equipment designed to use such utility's service.

(2) For purposes of this subsection and section 2623(b)(5) of this title, the terms "political advertising" and "promotional advertising" do not include—

(A) advertising which informs electric consumers how they can conserve energy or can reduce peak demand for electric energy,

(B) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act,

(C) advertising regarding service interruptions, safety measures, or emergency conditions,

(D) advertising concerning employment opportunities with such utility,

(E) advertising which promotes the use of energy efficient appliances, equipment or services, or

(F) any explanation or justification of existing or proposed rate schedules, or notifications of hearings thereon.

§ 2626. Reports respecting standards

(a) State authorities and nonregulated utilities.—Not later than one year after November

9, 1978, and annually thereafter for ten years, each State regulatory authority (with respect to each State regulated electric utility for which it has ratemaking authority), and each nonregulated electric utility, shall report to the Secretary, in such manner as the Secretary shall prescribe, respecting its consideration of the standards established by sections 2621(d) and 2623 (b) of this title. Such report shall include a summary of the determinations made and actions taken with respect to each such standard on a utility-by-utility basis.

(b) Secretary.—Not later than eighteen months after November 9, 1978, and annually thereafter for ten years, the Secretary shall submit a report to the President and the Congress containing—

(1) a summary of the reports submitted under subsection (a) of this section,

(2) his analysis of such reports, and

(3) his actions under this chapter, and his recommendations for such further Federal actions, including any legislation, regarding retail electric utility rates (and other practices) as may be necessary to carry out the purposes of this chapter.

§ 2627. Relationship to state law

(a) Revenue and rate of return.—Nothing in this chapter shall authorize or require the recovery by an electric utility of revenues, or of a rate of return, in excess of, or less than, the amount of revenues or the rate of return determined to be lawful under any other provision of law.

(b) State authority.—Nothing in this chapter prohibits any State regulatory authority or nonregulated electric utility from adopting, pursuant to State law, any standard or rule affecting electric utilities which is different from any standard established by this subchapter.

(c) Federal agencies.—With respect to any electric utility which is a Federal agency, and with respect to the Tennessee Valley Authority when it is treated as a State regulatory authority as provided in section 2602(17) of this title, any reference in section 2621 or 2623 of this title to State law shall be treated as a reference to Federal law.

SUBCHAPTER III—INTERVENTION AND JUDICIAL REVIEW

§ 2631. Intervention in proceedings

(a) Authority to intervene and participate.—In order to initiate and participate in the consideration of one or more of the standards established by subchapter II of this chapter or other concepts which contribute to the achievement of the purposes of this chapter, the Secretary, any affected electric utility, or any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or by a nonregulated electric utility.

(b) Access to information.—Any intervenor or participant in a proceeding described in subsection (a) of this section shall have access to information available to other parties to the proceeding if such information is relevant to the issues to which his intervention or participation in such proceeding relates. Such information may be obtained through reasonable rules relating to discovery of information prescribed by the State regulatory authority (in the case of proceedings concerning electric utilities for which it has ratemaking authority) or by the nonregulated electric utility (in the case of a proceeding conducted by a nonregulated electric utility).

(c) Effective date; procedures.—Any intervention or participation under this section, in any proceeding commenced before November 9, 1978, but not completed before such date, shall be permitted under this section only to the extent such intervention or participation is timely under otherwise applicable law.

§ 2632. Consumer representation

(a) Compensation for costs of participation or intervention.—

(1) If no alternative means for assuring representation of electric consumers is adopted in accordance with subsection (b) of this section and if an electric consumer of an electric utility substantially contributed to the approval, in whole or in part, of a position advocated by such consumer in a proceeding concerning such utility, and relating to any standard set forth in subchapter II of this chapter, such utility shall be liable to

compensate such consumer pursuant to paragraph (2) for reasonable attorney's fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of such position in such proceeding (including fees and costs of obtaining judicial review of any determination made in such proceeding with respect to such position).

(2) A consumer entitled to fees and costs under paragraph (1) may collect such fees and costs from an electric utility by bringing a civil action in any State court of competent jurisdiction, unless the State regulatory authority (in the case of a proceeding concerning a State regulated electric utility) or nonregulated electric utility (in the case of a proceeding concerning such nonregulated electric utility) has adopted a reasonable procedure pursuant to which such authority or nonregulated electric utility—

(A) determines the amount of such fees and costs, and

(B) includes an award of such fees and costs in its order in the proceedings.

(3) The procedure adopted by such State regulatory authority or nonregulated utility under paragraph (2) may include a preliminary proceeding to require that—

(A) as a condition of receiving compensation under such procedure such consumer demonstrate that, but for the ability to receive such award, participation or intervention in such proceeding

may be a significant financial hardship for such consumer, and

(B) persons with the same or similar interests have a common legal representative in the proceeding as a condition to receiving compensation.

(b) Alternative means.—Compensation shall not be required under subsection (a) of this section if the State, the State regulatory authority (in the case of a proceeding concerning a State regulated electric utility), or the nonregulated electric utility (in the case of a proceeding concerning such nonregulated electric utility) has provided an alternative means for providing adequate compensation to persons—

(1) who have, or represent, an interest—

(A) which would not otherwise be adequately represented in the proceeding, and

(B) representation of which is necessary for a fair determination in the proceeding, and

(2) who are, or represent an interest which is unable to effectively participate or intervene in the proceeding because such persons cannot afford to pay reasonable attorney's fees, expert witness fees, and other reasonable costs of preparing for, and participating or intervening in, such proceeding (including fees and costs of obtaining judicial review of such proceeding).

(c) Transcripts.—The State regulatory authority or nonregulated electric utility, as the case may be, shall make transcripts of the pro-

ceeding available, at cost of reproduction, to parties or intervenors in any ratemaking proceeding, or other regulatory proceeding relating to rates or rate design, before a State regulatory authority or nonregulated electric utility.

(d) Federal agencies.—Any claim under this section against any Federal agency shall be subject to the availability of appropriated funds.

(e) Rights under other authority.—Nothing in this section affects or restricts any rights of any participant or intervenor in any proceeding under any other applicable law or rule of law.

§ 2633. Judicial review and enforcement

(a) Limitation of Federal jurisdiction.—Notwithstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of subchapter I or II of this chapter or of this subchapter except for—

(1) an action over which a court of the United States has jurisdiction under subsection (b) or (c)(2) of this section; and

(2) review of any action in the Supreme Court of the United States in accordance with sections 1257 and 1258 of Title 28.

(b) Enforcement of intervention right.—

(1) The Secretary may bring an action in any appropriate court of the United States to enforce his right to intervene and participate under section 2631(a) of this title, and such court shall have jurisdiction to grant appropriate relief.

(2) If any electric utility or electric consumer having a right to intervene under section 2631(a) of this title is denied such

right by any State court, such electric utility or electric consumer may bring an action in the appropriate United States district court to require the State regulatory authority or nonregulated electric utility to permit such intervention and participation, and such court shall have jurisdiction to grant appropriate relief.

(3) Nothing in this subsection prohibits any person bringing any action under this subsection in a court of the United States from seeking review and enforcement at any time in any State court of any rights he may have with respect to any motion to intervene or participate in any proceeding.

(c) Review and enforcement.—

(1) Any person (including the Secretary) may obtain review of any determination made under subchapter I or II of this chapter or under this subchapter with respect to any electric utility (other than a utility which is a Federal agency) in the appropriate State court if such person (or the Secretary) intervened or otherwise participated in the original proceeding or if State law otherwise permits such review. Any person (including the Secretary) may bring an action to enforce the requirements of this chapter in the appropriate State court, except that no such action may be brought in a State court with respect to a utility which is a Federal agency. Such review or action in a State court shall be pursuant to any applicable State procedures.

(2) Any person (including the Secretary) may obtain review in the appropriate

court of the United States of any determination made under subchapter I or II of this chapter or this subchapter by a Federal agency if such person (or the Secretary) intervened or otherwise participated in the original proceeding or if otherwise applicable law permits such review. Such court shall have jurisdiction to grant appropriate relief. Any person (including the Secretary) may bring an action to enforce the requirements of subchapter I or II of this chapter or this subchapter with respect to any Federal agency in the appropriate court of the United States and such court shall have jurisdiction to grant appropriate relief.

(3) In addition to his authority to obtain review under paragraph (1) or (2), the Secretary may also participate as an amicus curiae in any review by any court of an action arising under the provisions of subchapter I or II of this chapter or this subchapter.

(d) Other authority of the Secretary.—Nothing in this section prohibits the Secretary from—

(1) intervening and participating in any proceeding, or

(2) intervening and participating in any review by any court of any action under section 6804 of Title 42.

§ 2634. Prior and pending proceedings

For purposes of subtitles subchapters I and II of this chapter, and this subchapter, proceedings commenced by State regulatory authorities (with respect to electric utilities for which it has ratemaking authority) and nonregulated electric utilities before November 9, 1978, and actions taken before such

date in such proceedings shall be treated as complying with the requirements of subchapters I and II of this chapter, and this subchapter if such proceedings and actions substantially conform to such requirements. For purposes of subchapters I and II of this chapter, and this subchapter, any such proceeding or action commenced before November 9, 1978, but not completed before such date, shall comply with the requirements of subchapters I and II of this chapter, and this subchapter, to the maximum extent practicable, with respect to so much of such proceeding or action as takes place after such date, except as otherwise provided in section 2631(c) of this title.

SUBCHAPTER IV—ADMINISTRATIVE PROVISIONS

§ 2641. Voluntary guidelines

The Secretary may prescribe voluntary guidelines respecting the standards established by sections 2621 (d) and 2623(b) of this title. Such guidelines may not expand the scope or legal effect of such standards or establish additional standards respecting electric utility rates.

§ 2642. Responsibilities of Secretary of Energy

(a) Authority.—The Secretary may periodically notify the State regulatory authorities, and electric utilities identified pursuant to section 2612(c) of this title, of—

(1) load management techniques and the results of studies and experiments concerning load management techniques;

(2) developments and innovations in electric utility ratemaking throughout the

United States, including the results of studies and experiments in rate structure and rate reform;

(3) methods for determining cost of service; and

(4) any other data or information which the Secretary determines would assist such authorities and utilities in carrying out the provisions of this chapter.

(b) Technical assistance.—The Secretary may provide such technical assistance as he determines appropriate to assist the State regulatory authorities in carrying out their responsibilities under subchapter II of this chapter and as is requested by any State regulatory authority relating to the standards established by subchapter II of this chapter.

(c) Appropriations.—There are authorized to be appropriated to carry out the purposes of subsection (b) of this section not to exceed $1,000,000 for each of the fiscal years 1979 and 1980.

§ 2643. Gathering information on costs of service

(a) Information required to be gathered.—Each electric utility shall periodically gather information under such rules (promulgated by the Commission) as the Commission determines necessary to allow determination of the costs associated with providing electric service. For purposes of this section, and for purposes of any consideration and determination respecting the standard established by section 2621(d)(2) of this title, such costs shall be separated, to the maximum extent practicable, into the following components: customer cost component, demand

cost component, and energy cost component. Rules under this subsection shall include requirements for the gathering of the following information with respect to each electric utility—

(1) the costs of servicing each electric consumer class, including costs of serving different consumption patterns within such class, based on voltage level, time of use, and other appropriate factors;

(2) daily kilowatt demand load curves for all electric consumer classes combined representative of daily and seasonal differences in demand, and daily kilowatt demand load curves for each electric consumer class for which there is a separate rate, representative of daily and seasonal differences in demand;

(3) annual capital, operating, and maintenance costs—

(A) for transmission and distribution services, and

(B) for each type of generating unit; and

(4) costs of purchased power, including representative daily and seasonal differences in the amount of such costs.

Such rules shall provide that information required to be gathered under this section shall be presented in such categories and such detail as may be necessary to carry out the purposes of this section.

(b) Commission rules.—The Commission shall, within 180 days after November 9, 1978, by rule, prescribe the methods, procedure and for-

mat to be used by electric utilities in gathering the information described in this section. Such rules may provide for the exemption by the Commission of an electric utility or class of electric utilities from gathering all or part of such information, in cases where such utility or utilities show and the Commission finds, after public notice and opportunity for the presentation of written data, views, and arguments, that gathering such information is not likely to carry out the purposes of this section. The Commission shall periodically review such findings and may revise such rules.

(c) Filing and publication.—Not later than two years after November 9, 1978, and periodically, but not less frequently than every two years thereafter, each electric utility shall file with—

(1) the Commission, and

(2) any State regulatory authority which has ratemaking authority for such utility, the information gathered pursuant to this section and make such information available to the public in such form and manner as the Commission shall prescribe. In addition, at the time of application for, or proposal of, any rate increase, each electric utility shall make such information available to the public in such form and manner as the Commission shall prescribe. The two-year period after November 9, 1978, specified in this subsection may be extended by the Commission for a reasonable additional period in the case of any electric utility for good cause shown.

(d) Enforcement.—For purposes of enforcement, any violation of a requirement of this section shall be treated as a violation of a provision of the Energy Supply and Environmental Coordination Act of 1974 enforceable under section 12 of such Act (notwithstanding any expiration date in such Act) except that in applying the provisions of such section 12 any reference to the Federal Energy Administrator shall be treated as reference to the Commission.

§ 2644. Relationship to other authority

Nothing in this chapter shall be construed to limit or effect any authority of the Secretary or the Commission under any other provision of law.

§ 2645. Utility regulatory institute

(a) Matching grants.—The Secretary may make grants under this section to an institute established by the National Association of Regulatory Utility Commissioners to enable such institute to—

(1) conduct research on electric and gas utility regulatory policy issues,

(2) develop data processing and retrieval methods for electric and gas utility ratemaking, and

(3) perform other functions directly related to assisting State regulatory authorities in carrying out their functions under State law and this act.

(b) Federal share.—Grants under this section shall not be used to provide more than the following percentages of the cost to the institute of carrying out the activities specified in subsection (a) of this section:

(1) 80 percent for the fiscal year 1979; and

(2) 60 percent for the fiscal year 1980.

The remaining amounts expended by the institute may not be provided from Federal sources.

(c) Restrictions.—Grants under this section may not be made subject to terms and conditions other than those the Secretary deems necessary for purposes of administering this section and for purposes of assuring that—

(1) all information gathered by the institute is available to the Secretary, the Commission, and the public, and

(2) no portion of any such grant is used to support or oppose any legislative proposal except by means of testimony by representatives of the institute provided by invitation to a committee of Congress or of a State legislature.

(d) Authorization of appropriations.—There is authorized to be appropriated not more than $2,000,000 for each of the fiscal years 1979 and 1980 for purposes of making grants under this section. No amounts may be appropriated for any fiscal year after the fiscal year 1980 to carry out the purposes of this section without a specific authorization of Congress.

TITLE II, SECTION 210

(16 U.S.C. (Supp. II) 824a-3)

Cogeneration and Small Power Production

(a) Cogeneration and small power production rules.—Not later than 1 year after November 9, 1978, the Commission shall prescribe, and

from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities. —The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities.—The results prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) Definition.—For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions.—

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory

authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which qualifying cogeneration facilities and qualifying small power production facilities are exempted in whole or part from this chapter, from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration fa-

cility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 824i, 824j, or 824k of this title or the necessary authorities for enforcement of any such provision under this chapter, or

(C) any license or permit requirement under subchapter I of this chapter, any provision under such chapter related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities.—

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement.—

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to any action to which section 2633 of this title applies.

(h) Commission enforcement.—

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations of a electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under this subchapter, such rule shall be treated as a rule under this chapter.

Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under this subchapter.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under this chapter. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of this chapter. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph

(A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts.—No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) Definitions.—For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 796(17) and (18) of this title.

TITLE III (15 U.S.C. (Supp. II) 3201 *et seq.*)

RETAIL POLICIES FOR NATURAL GAS UTILITIES

§ 3201. Purposes; coverage

(a) Purposes.—The purposes of this chapter are to encourage—

(1) conservation of energy supplied by gas utilities;

(2) the optimization of the efficiency of use of facilities and resources by gas utility systems; and

(3) equitable rates to gas consumers of natural gas.

(b) Volume of total retail sales.—This chapter applies to each gas utility in any calendar year, and to each proceeding relating to each gas utility in such year, if the total sales of natural gas by such utility for purposes other than resale exceeded 10 billion cubic feet during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(c) Exclusion of wholesale sales.—The requirements of this chapter do not apply to the operations of a gas utility, or to proceedings respecting such operations, to the extent that such operations or proceedings relate to sales of natural gas for purposes of resale.

(d) List of covered utilities.—Before the beginning of each calendar year, the Secretary shall publish a list identifying each gas utility to which this chapter applies during such calendar year. Promptly after publication of such

list, each State regulatory authority shall notify the Secretary of each gas utility on the list for which such State regulatory authority has ratemaking authority.

§ 3202. Definitions

For purposes of this chapter—

(1) The term "gas consumer" means any person, State agency, or Federal agency, to which natural gas is sold other than for purposes of resale.

(2) The term "gas utility" means any person, State agency, or Federal agency, engaged in the local distribution of natural gas, and the sale of natural gas to any ultimate consumer of natural gas.

(3) The term "State regulated gas utility" means any gas utility with respect to which a State regulatory authority has ratemaking authority.

(4) The term "nonregulated gas utility" means any gas utility other than a State regulated gas utility.

(5) The term "rate" means any (A) price, rate, charge, or classification made, demanded, observed, or received with respect to sale of natural gas to a gas consumer, (B) any rule, regulation, or practice respecting any such rate, charge, or classification, and (C) any contract pertaining to the sale of natural gas to a gas consumer.

(6) The term "ratemaking authority" means authority to fix, modify, approve, or disapprove rates.

(7) The term "sale", when used with respect to natural gas, includes an exchange of natural gas.

(8) The term "State regulatory authority" means any State agency which has ratemaking authority with respect to the sale of natural gas by any gas utility (other than by such State agency).

§ 3203. Adoption of certain standards

(a) Adoption of standards.—Not later than 2 years after November 9, 1978, each State regulatory authority (with respect to each gas utility for which it has ratemaking authority) and each nonregulated gas utility shall provide public notice and conduct a hearing respecting the standards established by subsection (b) of this section and, on the basis of such hearing, shall—

(1) adopt the standard established by subsection (b)(1) of this section if, and to the extent, such authority or nonregulated utility determines that such adoption is appropriate and is consistent with otherwise applicable State law, and

(2) adopt the standard established by subsection (b)(2) of this section if, and to the extent, such authority or nonregulated utility determines that such adoption is appropriate to carry out the purposes of this chapter, is otherwise appropriate, and is consistent with otherwise applicable State law.

For purposes of any determination under paragraphs (1) and (2) and any review of such determination in any court under section 3207

of this title, the purposes of this chapter supplement State law. Nothing in this subsection prohibits any State regulatory authority or nonregulated utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.

(b) Establishment.—The following Federal standards are hereby established:

(1) Procedures for termination of natural gas service.—No gas utility may terminate natural gas service to any gas consumer except pursuant to procedures described in section 3204(a) of this title.

(2) Advertising.—No gas utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising as defined in section 3204(b) of this title.

(c) Procedural requirements. — Each State regulatory authority (with respect to each gas utility for which it has ratemaking authority) and each nonregulated gas utility, within the 2-year period specified in subsection (a) of this section, shall adopt, pursuant to subsection (a) of this section, each of the standards established by subsection (b) of this section or, with respect to any such standard which is not adopted, such authority or nonregulated gas utility shall state in writing that it has determined not to adopt such standard, together with the reasons for such determination. Such statement of reasons shall be available to the public.

§ 3204. Special rules for standards

(a) Procedures for termination of gas service.—The procedures for termination of service referred to in section 3203(b)(1) of this title are procedures prescribed by the State regulatory authority (with respect to gas utilities for which it has ratemaking authority) or the nonregulated gas utility which provide that—

(1) no gas service to a gas consumer may be terminated unless reasonable prior notice (including notice of rights and remedies) is given to such consumer and such consumer has a reasonable opportunity to dispute the reasons for such termination, and

(2) during any period when termination of service to a gas consumer would be especially dangerous to health, as determined by the State regulatory authority (with respect to each gas utility for which it has ratemaking authority) or nonregulated gas utility, and such consumer establishes that—

(A) he is unable to pay for such service in accordance with the requirements of the utility's billing, or

(B) he is able to pay for such service but only in installments, such service may not be terminated.

Such procedures shall take into account the need to include reasonable provisions for elderly and handicapped consumers.

(b) Advertising.—

(1) For purposes of this section and section 3203 of this title—

(A) The term "advertising" means the commercial use, by a gas utility, of any media, including newspaper, printed matter, radio, and television, in order to transmit a message to a substantial number of members of the public or to such utility's gas consumers.

(B) The term "political advertising" means the advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any controversial issue of public importance.

(C) The term "promotional advertising" means any advertising for the purpose of encouraging any person to select or use the service or additional service of a gas utility or the selection or installation of any appliance or equipment designed to use such utility's service.

(2) For purposes of this section and section 3203 of this title, the terms "political advertising" and "promotional advertising" do not include—

(A) advertising which informs natural gas consumers how they can conserve natural gas or can reduce peak demand for natural gas,

(B) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act,

(C) advertising regarding service interruptions, safety measures, or emergency conditions,

(D) advertising concerning employment opportunities with such utility,

(E) advertising which promotes the use of energy efficient appliances, equipment or services, or

(F) any explanation or justification of existing or proposed rate schedules, or notification of hearings thereon.

§ 3205. Federal participation

(a) Intervention.—In addition to the authorities vested in the Secretary pursuant to any other provision of law, the Secretary, on his own motion, may intervene as a matter of right in any proceeding before a State regulatory authority which relates to gas utility rates or rate design. Such intervention shall be solely for the purpose of advocating policies or methods which carry out the purposes set forth in section 3201 of this title.

(b) Rights.—The Secretary shall have the same rights as any other party to a proceeding before a State regulatory authority which relates to gas utility rates or rate design.

(c) Nonregulated gas utilities.—The Secretary, on his own motion, may, to the same extent as provided in subsections (a) and (b) of this

section, intervene as a matter of right in any proceeding which relates to rates or rate design of nonregulated gas utilities.

§ 3206. Gas utility rate design proposals

(a) Study.—

(1) the Secretary, in consultation with the Commission and, after affording an opportunity for consultation and comment by representatives of the State regulatory commissions, gas utilities, and gas consumers, shall study and report to Congress on gas utility rate design within 18 months after November 9, 1978. Such study shall address the effect (both separately and in combination) of the following factors upon the items listed in paragraph (2): incremental pricing; marginal cost pricing; end user gas consumption taxes; wellhead natural gas pricing policies; demand-commodity rate design; declining block rates; interruptible service; seasonal rate differentials; and end user rate schedules.

(2) The items referred to in paragraph (1) are as follows:

(A) natural gas pipeline and local distribution company load factors;

(B) rates to each class of user, including residential, commercial, and industrial users;

(C) the change in total costs resulting from gas utility designs (including capital and operating costs) to gas consumers or classes thereof;

(D) demand for, and consumption of, natural gas;

(E) end use profiles of natural gas pipelines and local distribution companies; and

(F) competition with alternative fuels.

(b) Proposals.—Based upon the study prepared pursuant to subsection (a) of this section, the Secretary shall develop proposals to improve gas utility rate design and to encourage conservation of natural gas. Such proposals shall include any comments and recommendations of the Commission.

(c) Transmission to Congress.—The proposals prepared under subsection (b) of this section shall be transmitted, together with any legislative recommendations, to each House of Congress not later than 6 months after the date of submission of the study under subsection (a) of this section. Such proposals shall be accompanied by an analyses of—

(1) the projected savings (if any) in consumption of natural gas, and other energy resources,

(2) changes (if any) in the cost of natural gas to consumers, which are likely to result from the implementation nationally of each of such proposals, and

(3) the effects of the proposals on other provisions of this Act on gas utility rate structures.

(d) Public participation.—The Secretary shall provide for public participation in the conduct

of the study under subsection (a) of this section and the preparation of proposals under subsection (b) of this section.

§ 3207. Judicial review and enforcement

(a) Limitation of Federal jurisdiction.—

(1) Notwithstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of this chapter except for—

(A) an action over which a court of the United States has jurisdiction under paragraph (2), or

(B) review in the Supreme Court of the United States in accordance with sections 1257 and 1258 of Title 28.

(2) The Secretary may bring an action in any appropriate court of the United States to enforce his right to intervene under section 3205 of this title and such court shall have jurisdiction to grant appropriate relief.

(b) Enforcement.—

(1) Any person may bring an action to enforce the requirements of this chapter in the appropriate State court. Such action in a State court shall be pursuant to applicable State procedures.

(2) Nothing in this chapter shall authorize the Secretary to appeal or otherwise seek judicial review of the decisions of a State regulatory authority or nonregulated gas

utility or to become a party to any action to obtain such review or appeal. The Secretary may participate as an amicus curiae in any judicial review of an action arising under the provisions of this chapter.

§ 3208. Relationship to other applicable law

Nothing in this chapter prohibits any State regulatory authority or nonregulated gas utility from adopting, pursuant to State law, any standard or rule affecting gas utilities which is different from any standard established by this chapter.

§ 3209. Reports respecting standards

(a) State authorities and nonregulated utilities.—Not later than 1 year after November 9, 1978, and annually thereafter for 10 years, each State regulatory authority (with respect to each gas utility for which it has ratemaking authority), and each nonregulated gas utility, shall report to the Secretary, in such manner as the Secretary shall prescribe, respecting its consideration of the standards established by this chapter. Such report shall include a summary of the determinations made and actions taken with respect to each of such standards on a utility-by-utility basis.

(b) Secretary.—Not later than 18 months after November 9, 1978, and annually thereafter for 10 years, the Secretary shall submit a report to the President and the Congress containing—

(1) a summary of the reports submitted under subsection (a) of this section,

(2) his analysis of such reports, and

(3) his actions under this chapter, and his recommendations for such further Federal actions, including any legislation, regarding retail gas utility rates (and other practices) as may be necessary to carry out the purposes of this chapter.

§ 3210. Prior and pending proceedings

For purposes of this chapter, proceedings commenced by any State regulatory authority (with respect to gas utilities for which it has ratemaking authority) and any nonregulated gas utility before November 9, 1978, and actions taken before such date in such proceedings shall be treated as complying with the requirements of this chapter if such proceedings and actions substantially conform to such requirements. For purposes of this chapter, any such proceeding or action commenced before November 9, 1978, but not completed before such date shall comply with the requirements of this chapter, to the maximum extent practicable, with respect to so much of such proceeding or action as takes place after such date.

§ 3211. Relationship to other authority

Nothing in this chapter shall be construed to limit or affect any authority of the Secretary or the Commission under any other provision of law.

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